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The Supreme Court, U. S.
FILED
MAR 16 1907
JAMES H. McKENNEY,
Clerk.

No. 263.

In the Supreme Court of the United States.

OCTOBER TERM, 1906.

THE UNITED STATES, APPELLANT,
v.
THE WILLIAM CRAMP AND SONS SHIP AND ENGINE BUILDING COMPANY.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

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STATEMENT OF THE CASE.

The naval appropriation act of June 30, 1890 (26 Stats., 189, 205), provided:

> That for the purpose of further increasing the naval establishment of the United States the President is hereby authorized to have constructed by contract three sea-going coast-line battle ships designed to carry the heaviest armor and most powerful ordnance upon a displacement of about eight thousand five hundred tons, with a coal endurance of

[a] A brief on the cross-appeal of the Cramp company will be submitted separately.

> about five thousand knots on the total coal capacity at the most economical rate of speed, and to have the highest practicable speed for vessels of their class, to cost, exclusive of armament and of any premiums that may be paid for increased speed, not exceeding four million dollars each.

Under this authority, on November 19, 1890, the United States, by the Secretary of the Navy, contracted with the William Cramp & Sons Ship and Engine Building Company for the construction of a battle ship, the first to be built in this country, known at first as "*No. 1*," and afterwards called the *Indiana*, at a cost of $3,063,000. The contract contained, *inter alia*, the following provisions:

The Cramp Company was to "furnish all the armor, armor bolts and their accessories, and all the labor and material required in the construction of the protective deck," and the United States was to "furnish all other armor, armor bolts and their accessories, to be used in the construction of the vessel, including such as may be required in the construction of the belt, turrets, redoubts [as planned and constructed the vessel had no armor designated as 'redoubt'], barbettes, conning tower, gun shields, ammunition tubes, and in the protection of the guns and loading positions, * * * and deliver said armor, armor bolts and their accessories * * * within the times and in the order required to carry on the work properly." (Rec., 7.)

The Cramp Company was to put the armor in place, and build and equip the vessel in other respects, and deliver it complete in three years from the date of the contract, subject to a deduction of $75 per day from the contract price for the first three months of delay, $150 per day for the second three months of delay, and $200 per day for all delays over six months. (Rec., 9.)

The deductions were only to be made for delays which "shall not have been caused by the act of the United States, or by fire or water, or by any strike or stand out of workmen employed in the construction of the hull, machinery, fittings, or equipment," or in the fitting or securing the armor, "or by other circumstances beyond the control" of the Cramp Company. (Rec., 9–10.)

All delays which the Secretary of the Navy should "find to be properly attributable to the Navy Department, or to its authorized officers or agents, or any or either of them, and to have been a delay operating upon the final completion of the vessel within the time specified therefor," should entitle the Cramp Company "to a corresponding extension of the period herein prescribed for the completion of the vessel." (Rec., 10.)

The hull, machinery, fittings, and equipment of the vessel, and all materials and appliances provided for her construction, were to be kept fully insured, the insurance to be renewed and increased from time to time by the Cramp Company and at

its cost, the loss being payable to the United States. (Rec., 9.)

If upon the completion of the vessel as required by the contract, except as to "the armor for her side belt, casemate, turrets, redoubts, barbettes, and conning tower," the United States should not have commenced the delivery of such armor, the vessel should be subjected to a trial trip, and if upon such trial all the conditions of the contract, except as to such armor, should be fulfilled, the vessel should be preliminarily accepted; and if within five months after such preliminary acceptance the United States should not have commenced the delivery of such armor, the vessel should be finally accepted and the cost of putting the armor in place should be ascertained and deducted from the contract price; but if before the final trial, or within five months after preliminary acceptance, the United States should "commence and continue with reasonable diligence" the delivery of such armor, the Cramp Company should put it in place in accordance with the contract. (Rec., 7–8.)

Payment was to be made in thirty equal installments, as the work progressed, with a reservation of 10 per cent from each installment. The last three installments, as well as the reservations from the first 27, were not to be paid until preliminary acceptance, and to provide for possible defects a special reserve of $60,000 was to be retained by the United States until final acceptance of the vessel. (Rec., 11–12, 15.)

When the Cramp Company had fully performed its part of the contract it was to receive the special reserve, or so much of it as might be left, "on the execution of a final release to the United States, in such form as shall be approved by the Secretary of the Navy, of all claims of any kind or description under or by virtue of this contract." (Rec., 15.)

The United States obtained the armor from other contractors, who failed to complete the manufacture thereof in time for delivery to the Cramp Company as the contract provided, and in consequence of this the completion of the vessel was delayed two years beyond the contract period. Accordingly the Secretary of the Navy extended the time for completion by two years, i. e., until November 19, 1895, the date of acceptance of the vessel. On receipt of the final payment, the Cramp Company executed a full release to the United States "of and from all and all manner of debts, dues, sum and sums of money, accounts, reckonings, claims, and demands whatsoever, in law or in equity, for or by reason of, or on account of, the construction of said vessel under the contract aforesaid." This release appears to have been given without objection or protest. (Rec., 18, 19–20.)

More than twenty months before the completion of the vessel, viz, early in March, 1894, the Cramp Company wished to have the vessel make a trial trip in her then condition, but the Secretary

of the Navy ultimately refused. (Rec., 22.) The diagonal armor, casemate armor, conning-tower tube, and barbette armor had been already delivered, and the sponson armor was then being delivered. (Rec., 18.) On May 10, 1894, the parties executed an agreement whereby the United States agreed to pay so much of the last three installments of the contract price and of the reservations from previous payments as would leave enough, in the judgment of the Secretary of the Navy, to cover the cost of all unfinished work and all contingencies, and the Cramp Company was to give bond to refund the money so paid, if called upon to do so. In consideration of the payment so made, the Cramp Company released the United States "from all and every claim for loss or damage hitherto sustained by reason of any failure on the part of the [United States] to comply with its contract, or on account of any delay hitherto occasioned by the action of [the United States]." Under this agreement the Cramp Company was paid $234,830, being the amount of the reservations of the first twenty-three installments, and it was never called upon to refund any of the money so paid. (Rec., 19.)

On August 10, 1897, the Cramp Company filed its petition in this case, claiming damages on account of the delay in furnishing the armor (Rec., 1), and on January 29, 1906, the court gave judgment for the damages which it found had accrued since May 10 1904, when the release was given

as to damages for delays occurring before that date. It found the following amounts as damages:

The reasonable value for the use of the claimant's yard, machinery and tools, and for superintendence in the construction of the vessel, including the general upkeep of the yard chargeable to the *Indiana*, $3,000 per month, making	$54,887.67
The reasonable cost of the proper care and protection of the vessel during the two years' delay, including expense of cleaning the bottom, furnishing material and painting, temporary awnings and tents over caps left for the introduction of turrets, additional scaling to remove rust before painting, electric lighting, keeping up steam to prevent freezing of valves, wetting down decks, going over machinery, and keeping vessel free from snow, dust, ice, and débris, from May 10, 1894	36,591.78
Wharfage from May 10, 1894, including the dredging of a basin to accommodate the vessel	17,808.00
The proportionate expense, for the period from May 10, 1894, of the cost of insurance during the two years' delay	26,272.55
	135,560.00

(Rec., 21, 22, 23.)

If the United States had been held liable for damages accruing during the whole period of delay the total of the above items would have been $177,823.55.

The court below further found that after the Cramp Company had expressed its wish for a trial trip early in March, 1894, as already stated above, the Secretary of the Navy wrote that "in view of the fact that the trial of the *Indiana* will take place at an early date," the Cramp Company should confer with two designated officers of the Navy as to the expenses incurred in preparing for the trial trip. These expenses, which were verified by the officers, amounted to $17,514.94, which amount was

reasonable. A board of officers reported that as the vessel was not yet completed a trial trip would not be for the interest of the Government, and accordingly the Secretary refused to allow it to be made. The court below made no allowance on account of this item. (Rec. 22, 36, 37.)

Whereupon the United States took this appeal on April 3, 1906, and on April 16, 1906, the Cramp Company took a cross appeal. (Rec., 38, 39.)

ASSIGNMENTS OF ERROR.

The court below erred:

(1) In holding that the extension of the time for the completion of the vessel, made under the ninth clause of the contract, did not prevent the United States from being liable for damages on account of delay in delivering the armor.

(2) In holding that the final release, executed May 18, 1896, did not release the United States from liability for damages on account of delay in delivering the armor.

(3) In holding that the United States was liable for wharfage for the *Indiana* during the period when she remained at the Cramp Company's shipbuilding yard after the expiration of the contract time for the completion, although the Cramp Company was not a wharfinger, and damages have been allowed for the use of its yard.

(4) In holding the United States liable for a portion of the cost of insurance of the vessel during

the two years' delay, in proportion to the time after May 10, 1894, instead of holding it liable for the actual net amount paid by the Cramp Company for insurance after May 10, 1894, less the amount which it saved on account of having to maintain a less amount of insurance during the original contract term than if the vessel had been completed within that term.

(5) In entering judgment for the Cramp Company in the sum of $135,560.

BRIEF OF ARGUMENT.

QUESTIONS RAISED BY THE APPEAL OF THE UNITED STATES.

I.

As to the First Assignment of Error.

THE EXTENSION OF TIME FOR COMPLETION, AS PROVIDED FOR IN THE CONTRACT, WAS INTENDED TO OBVIATE THE EFFECT OF ANY DELAYS ATTRIBUTABLE TO THE NAVY DEPARTMENT, OR ITS AGENTS, SO THAT, WHEN THIS EXTENSION WAS MADE, THE CONTRACT BECAME IN EFFECT A CONTRACT FOR COMPLETION IN FIVE YEARS, AND NO DELAY COULD BE CHARGED TO HAVE OCCURRED.

It is self-evident that if the performance of any contract between two parties be delayed, the delay must be attributable either to one party or to the other party, or to neither party. Now, if the provisions of the ninth clause of the contract (Rec., 9–10) be carefully studied, it will be seen that these

three classes of delay have been recognized and provided for, different consequences being attached in the case of each class.

1. In the case of delays caused by circumstances within the contractor's control—i. e., delays attributable to the contractor, penalties were imposed.

2. In the case of delays attributable to neither party no penalties were imposed. These are the delays which were described as caused "by fire or water, or by any strike or stand out of workmen employed in the construction of the hull, machinery, fittings, or equipment of said vessel, or in the fitting, placing, and securing of her armor, or by other circumstances beyond the control of the party of the first part"—i. e., the contractor.

3. In the case of delays attributable to the United States, not merely were no penalties imposed, but also the contractor was entitled to a corresponding extension of the period prescribed for the completion of the vessel. These are the delays described in the first place as caused "by any act of the party of the second part," and more specifically as "delays which the Secretary of the Navy shall find to be properly attributable to the Navy Department or to its authorized officers or agents or any or either of them, and to have been a delay operating upon the final completion of the vessel within the time specified therefor in this contract."

Possibly the delays attributable to the United States should be regarded as of two kinds, viz, those attributable to the Navy Department or its

officers or agents, and those attributable to the act of some other Department of the Government, the provision for the extension of time being only intended to apply in the former case. This, however, is unimportant, because in the present case the delay was one attributable to the agents of the Navy Department, being due to the failure of its agents, the armor contractors, to furnish the armor when it was wanted.

In the case of delays attributable to neither party, the contractor might suffer serious loss, but of course, it could claim nothing from the Government on that account, and the provision that no deductions should be made from the contract price on account of such delays gave the contractor all the relief which it could fairly ask. In this case, therefore, no extension of time was necessary, because such an extension could not possibly have any effect on the rights or liabilities of either party.

In the case of delays attributable to the Government, there could be no deductions from the contract price, and this would have been so even if it had not been so stated in the contract. As the court below properly said, "the claimant being without fault in the delay, no penalty could have been imposed upon it without gross error akin to fraud." (Rec., 28.) Hence the provision for an extension of time was not necessary to protect the contractor against deductions on account of delay, and the only possible object for such a provision

was to relieve the Government from pecuniary liability for such delays.

Without this provision for an extension of time the contract would have called for completion of the vessel in three years, but the effect of this provision was to make the contract term three years or such longer time as might be required by delays attributable to the Navy Department or its agents. When the extension was actually made, under this provision, then, by the operation of the terms of the contract itself, it ceased to be a contract for building a vessel in three years, and became a contract for building it in five years, and it is strictly true to say that, under this contract for building the vessel in five years, there was no delay whatever in regard to its completion, and consequently no right to claim damages for such delay.

This contract, which the claimant certainly entered into with its eyes open, can not, it is submitted, be reasonably understood as meaning anything else than that an extension of the contract term should have the same effect as if the date to which the time for completion was extended had been originally fixed in the contract as the date of completion, so that the Government should not be liable for delay any more than it would have been had the vessel been completed within the time originally fixed. There was a very good and a very evident reason for so protecting the Government from liability. A very important part of the structure, the armor, had to be supplied by other

contractors, who had never done precisely this kind of work before. The *Indiana* was, in a very real sense, "battleship *No. 1*," and, in view of the novelty and difficulty of the work, delay was almost inevitable; and as such delay would not be due to any fault of the Government, it was reasonable that the latter should not be liable to the claimant for it. Hence this provision was introduced in order to prevent any such liability.

The court below, however, has held that an extension of the time for the completion of the vessel did not preclude the contractor from recovering for damages due to delays attributable to the Navy Department, and this for three reasons:

(1) The reported cases furnished no authority for so construing the contract as to hold the contractor precluded. (Rec., 25–27.)

(2) The object of the provision for an extension of time was to insure the completion of the vessel and had nothing to do with the question of damages. (Rec., 27–28.)

(3) The contract does not directly state that an extension of the time relieves the Government from liability for delay, and no such relief from liability can be inferred. (Rec., 28.)

These reasons will be considered in their order.

(1) As to this point, it is submitted that the court below has misunderstood the authorities, which are really against its conclusion.

Haydnville Mining and Manufacturing Company v. *Art Institute* (39 Fed. Rep., 484), a Circuit

Court case, was an action to recover for extra work and also for damage due to the delay of other contractors. The contract was for the fireproofing work done on a building, work which would necessarily be delayed if the building was not ready for the fireproofing at the proper time. The contract had this provision:

> Should delay be caused by other contractors to the positive hindrance of the contractor hereto, a just and proper amount of extra time shall be allowed by the architect, provided it shall have given written notice to said architect at the time of such hindrance or delay.

In that case the court said:

> Taking this clause of the contract and the specifications together, I construe them to mean this: That, if the plaintiff was delayed by reason of the tardiness or want of dispatch on the part of the contractors doing the other classes of work upon the building, it should be entitled to such further time for the completion of the work as the architects should allow him (*sic*), but I do not see that there is any provision that it is entitled to pecuniary damages by reason of said delay. Evidently the parties anticipated that this contractor, doing only a part of the work, and that which was largely dependent upon the completion of other classes of the work by other contractors, must await the movements of those other contractors, and it seems to me that the stipulation for further time to

> complete the work in case of delay by other contractors implies that there is to be no pecuniary compensation for such delay.

The only differences between that case and the present are that in the former there were no penalties for delay by the contractor, and the extension of time was to be in case of delay by other contractors; and these differences do not affect the principle involved in the two cases. Penalties or deductions, in a contract like the present one, are merely liquidated damages, and the absence of any provision for penalties merely meant that the contractor was liable for actual damages and not for damages arbitrarily liquidated. If the contractor was entitled to an extension of time, of course no damages could be recovered from him, whether liquidated or not; and, on the other hand, if the contractor was responsible for the delay he would be liable in damages, though perhaps not to as large an amount as if they had been liquidated.

Then, too, the fact that in the *Haydnville Company* case the time was to be extended on account or delays caused by other contractors does not affect the value of that case as a precedent. What is there decided is that where a contract provides that in the event of delays caused by other contractors the time is to be extended, the owner is not liable for damages caused by such delays; and the necessary corollary of this proposition is that where a contract provides that in the event of delays caused by the owner or his agents the time is

to be extended, he is not liable for damages caused by such delays. The gist of the decision is that a provision for an extension of time in case of delays due to any given cause prevents such delays from constituting a cause of action, and the mere fact that the cause for which an extension of time is provided is rather more limited in the *Haydnville Company* case than in the present case is not important.

The court below, however, has seen in the *Haydnville Company* case only the two unimportant differences between it and the present case, and has failed to appreciate the close analogy between the two cases. The opinion says:

> The evident purpose of that provision of the contract, it seems to us, was to relieve both parties from any liability for delays caused by other contractors. That is to say, the plaintiff was not to be held responsible to the defendants for delays caused by other contractors, nor was the defendant to be held responsible to the plaintiff for such delays, both parties being equally blameless. In other words, as between the parties to the contract there was no breach, and hence no right of action accrued to either.

In the present case the contract treats delays for which the Navy Department was responsible precisely as delays caused by other contractors were treated in the *Haydnville Company* case, and one reason for such treatment in the present contract is obviously that the parties knew that there

was great danger of delay on the part of the armor contractors, and realized that as the Government had agreed to deliver the armor "within the times and in the order required to carry on the work properly," it would, in the event of such delay, be liable in damages for what was really not its own fault, unless there were some provision for its relief. This very evident reason for the insertion of the extension clause makes the present contract in this respect substantially identical in purpose with the contract in the *Haydnville Company* case, but even without this reason the analogy would have been very close.

Richard v. *Clark* (88 New York Supp., 242) resembles the present case still more closely, in that delays for which the owner was responsible were provided for. The contract read:

> Should the contractor be obstructed or delayed in the prosecution or completion of his work by the act, neglect, delay, or default of the owner or the architect, or of any other contractor employed by the owner upon the work, or by any damage which may happen by fire, lightning, earthquake, or cyclone, or by the abandonment of the work by the employee through no fault of the contractor, then the time herein fixed for the completion of the work shall be extended for a period equivalent to the time lost by reason of any or all of the causes aforesaid.

The actual delay was caused by the architect, and the lower court gave judgment in the con-

tractor's favor for the damages due to such delay, but the Supreme Court reversed the judgment, saying:

> Nor am I satisfied that any damages in the case are recoverable either for a delay or for extra work. The claim for delay was necessarily based upon the failure of defendant's architects to furnish the detail plans in time, as to which the contract provided that if the contractor "be delayed in the prosecution or completion of his work by the act, neglect, delay, or default of the owner or the architects," etc., "then the time herein fixed for the completion of the work shall be extended for a period equivalent to the time lost by reason of any or all the causes aforesaid." The contract therefore explicitly contemplated a situation such as has here arisen, and the intention of the parties, as evidenced by the agreement, evidently was that the time clause affected the plaintiff alone, and that he might be absolved therefrom to the extent and in the manner provided in the contract.

Had the delay been caused by the owner himself the decision would necessarily have been the same, so that practically that case is on all fours with the present one. As already stated in connection with the *Haydnville Company* case the mere absence of any provision for penalties can not constitute a material distinction, and yet that is the only point of difference which the court below can point out.

Disregarding the close analogy between these two cases and the present case, the court below relies upon *Nelson* v. *Pickwick Associated Company* (30 Ill. App., 333), in which it was held that an extension of time, under a clause similar to that in the *Haydnville Company* case, did not prevent the owner from being liable in damages. The chief reason which the Illinois court gave for its decision, however, is one which does not apply here. The contractor was liable to a penalty of $25 a day for delay, and the court said, "The provision for the extra time was for the avoidance of the penalty the appellant would incur if he did not complete his contract on time." In the present case the contract expressly provided that there should be no deductions for any delays due to circumstances beyond the contractor's control, so that, whatever was the object of the provision for an extension of the time, it is certain that it was *not* "for the avoidance of the penalty the [contractor] would incur if he did not complete his contract on time." The two cases are therefore readily distinguishable.

There is another case, not mentioned by the court below, but cited in argument by the counsel for the Cramp Company, which it may be well to refer to here, viz, *Lawson* v. *Wallasey Local Board* (Law Repts., 11 Q. B. D., 229). This case is clearly distinguishable from the present one because the decision is explicitly based on the fact that the defendant had delayed the work unreason-

ably, which is not the case here. The contract was for dredging, to be completed by a certain date, subject to an extension of time in case a certain temporary staging should not be removed soon enough to permit completion by that date. The staging was not removed until nearly a year after the date set for completion, and the delay in removal was apparently due solely to the defendant's own neglect. Lord Denman, C. J., said:

> We think that, looking at the terms of the contract, which provided for a definite amount of dredging to be done by a certain time, with power to the engineer to extend that time as long as he should think reasonable in case of the nonremoval of the staging, there is an implied contract on the part of the defendants that the removal of the staging should not be *unreasonably* delayed. We think that this is the legitimate inference to be drawn from the case of *Roberts* v. *The Bury Commissioners* (L. R., 5 C. P., 310), which was fully discussed in the argument before us.

Roberts v. *The Bury Commissioners*, cited by Lord Denman, was a case where the defendants had annulled a contract on the ground of the plaintiff's failure to use diligence and make due progress on the work, but the replication stated that this failure was due to a breach of contract on the part of the defendants themselves and their architect. As this averment was not traversed and the rejoinder was held insufficient, the decision was necessarily based upon the facts so

averred. Upon these facts it was held that the defendants had no power to annul the contract, because in so doing they were attempting to take advantage of their own wrong.

The gist of the decision is simply that as the defendants had broken their contract and had thereby delayed the plaintiff, they could not take advantage of that delay to annul the contract; and the application of this doctrine to the *Wallasey Board* case is that as the defendants had delayed the plaintiff *unreasonably* they could not avoid liability by an extension of the time. The defendants could apparently have had the staging removed at any time, and no reason was shown for their failure to have this done; they simply neglected the matter until so much time had elapsed that the plaintiff was seriously damaged. Lord Denman's language, quoted above, clearly implies that the provision for an extension of time was inserted in order to relieve both sides from liability for delay unless such delay was unreasonable. If the work were delayed by the nonremoval of the staging, then the engineer was to grant a reasonable extension of time, which extension would relieve the contractor from all liability for penalties for delay unless he failed to complete the work within such reasonable extension of time; and such extension would relieve the defendants also from all liability in damages for the delay unless their delay was unreasonable, as it was ultimately held to be.

The converse of that doctrine, however, is that if the defendants could not have avoided the delay in removing the staging, so that such delay would not have been unreasonable, they would not have been liable on account of it. This converse proposition distinctly supports the Government's position in the present case, for the delay was not unreasonable as far as the Government was concerned, but was due to the slowness of the armor contractors, the making of heavy armor plate being a novelty in this country, so that the doctrine of the *Wallasey Board* case can not apply. As already stated, the doctrine of the *Pickwick Company* case also fails to apply, because the extension of time was not needed to relieve the contractor from liability for penalties. As far as reported decisions go, therefore, the closest analogy is afforded by the *Haydnville Company* case and *Richard* v. *Clark*, and it is submitted that the doctrine applied in those two cases is the one to apply here.

(2) As to the object of the provision for an extension of time, it is submitted that the court below has misunderstood the contract. The court below has held that the object of the provision for an extension of time was to insure the completion of the vessel in any event, even if the Navy Department should delay the work; and also that it must have been intended that the Government should be liable in damages for delays attributable to it, because otherwise it might delay the work indefi-

nitely to the great injury of the contractor. The opinion says:

> From the language of the ninth clause of the contract it is evident that what was in the minds of the parties was that if through the fault of the claimant the vessel was not completed within the contract time then the penalties by way of deduction from the contract price might be imposed; but if delayed by the fault of the Government then additional equivalent time should be allowed, not in lieu of compensation for damages for such delay but to enable the claimant to proceed to complete the vessel. But for that provision in the contract for additional time, the delay caused by the Government (the claimant having performed its part) would have discharged the claimant from further performance and left it with a right of action for damages on the obligation growing out of the breach. Or the claimant might have continued to perform, reserving to itself the right to sue for such damages as it may have sustained. On the other hand, as the claimant by the terms of the contract agreed that additional time should be allowed equivalent to such delay, it thereby waived its right to terminate the contract for that cause; but the question of waiving its right to damages growing out of such delay was certainly not in the minds of the parties at the time the contract was entered into.
>
> * * * The granting of such additional time was clearly for the benefit of the Government, as it thereby prevented the termi-

> nation of the contract and saved it the expense of reletting the work to other contractors. Any other construction of the contract, it appears to us, might result in irreparable damage to the claimant, for if the Government is not to be held responsible in damages for its delay by reason of a corresponding extension of time then it may delay the work indefinitely and exonerate itself by the mere granting of additional time in which to enable a contractor to complete his work. (Rec., 27, 28.)

In the passage just quoted the court below treats the provision for an extension of time as applying to delays caused by the "fault" of the Government. Had the present case involved any such "fault," there might perhaps have been some justification for holding the Government liable in spite of the extension of time, but the delay was due to the fact that the contractors for the armor "failed to complete the manufacture thereof in time for the defendants to deliver the same to the claimant as they had agreed to do." (Rec., 18, lines 17–19 of Finding III.) This was clearly no "fault" of the Government, and the record does not even state that it was actually the "fault" of the armor contractors—it may have been unavoidable in spite of their best efforts—but even if had been their fault it was not chargeable to any act or neglect on the Government's part. As far as applies to such a cause of delay as the present case involves the

reasoning of the court below is clearly beside the mark.

Assuming, however, for the sake of the argument, that the court below used the word "fault" in a loose sense, as meaning something attributable to the Government or its agents, still it is clear that the court below, in reaching its conclusion, has overlooked certain important provisions of the contract which completely cover the contingencies suggested in the passage quoted above. Setting aside delays due to some tortious act or neglect on the part of the Government's officers, which the contract did not contemplate, and for which it made no provision, and which need not now be considered, especially as no such delays occurred, the only substantial delays which could be attributable to the Navy Department or its agents would be those due either to changes in the plans of the vessel or to nondelivery of armor at the proper time, and the contract provides for the completion of the vessel, in the event of either contingency, entirely apart from this provision of time.

The matter of changes is covered by the second clause of the contract (Rec., 6–7), and whether the word "damage," as used in that clause (Rec., 6, next to last line) includes damages due to delay occasioned by changes or not (a question which does not arise in this case and which need not be decided here), it is certain that, under that second clause, the contractor was required to complete the

vessel in any event, in spite of any delay which changes might cause.

Similarly the third clause of the contract provides for completion in the event of nondelivery of armor at the proper time. That clause provides that the contractor "shall furnish all the armor * * * required in the construction of the protective deck," and that the Government shall furnish all other armor, armor bolts, and their accessories, to be used in the construction of the vessel, including such as may be required in the construction of the belt, turrets, redoubts, barbettes, conning tower, gun shields, ammunition tubes, and in the protection of the guns and loading positions." (Rec., 7.)

This statement of the different kinds of armor to be furnished by the Government is obviously a general statement of all the armor which it was to furnish. The third clause further provides that if the Government should not commence the delivery of "the armor for her side belt, casemate, turrets, redoubts, barbettes, and conning tower" by the time the vessel was complete in all other respects the preliminary trial trip should take place without the armor. (Rec., 7, last eleven lines.) The reference to this armor as "the armor for her side belt, casemates," etc., though slightly differently worded from the expression used a few lines before, is obviously meant to refer to the same armor, viz, *all* the armor which the Government was to furnish, as the Government's obligation to

furnish was the same as to all, and the failure to furnish any one of these species of armor would delay the vessel if the contractor was required to wait.

The third clause further provides that if such preliminary trial of the vessel (without armor) showed that all the conditions and requirements of the contract, except as to the armor, had been fulfilled, the vessel should be preliminarily accepted, or conditionally accepted if she did not have the required speed. Moreover, if the Government should not commence the delivery of the armor within five months after preliminary or conditional acceptance, or before the final trial (which had to be made, if at all, within the five months), then the vessel was to be finally accepted and paid for, the cost of putting on the armor being deducted. On the other hand, if the Government began to deliver the armor within five months after preliminary or conditional acceptance, or prior to the final trial, and continued the delivery with reasonable diligence, the contractor was required to put the armor in place. (Rec., 8.)

These provisions are perfectly clear. They mean that if the delivery of the armor was delayed the contractor could go ahead and complete the vessel without the armor, and be paid without any delay or incurring any damages whatever. Moreover, the contractor would obviously have the same right if the Government, having once begun to deliver the armor, should not continue the

delivery with reasonable diligence, for it can not have been intended that merely beginning to deliver the armor, without more, would meet the requirements of this provision. The contract explicitly states that if the Government, before the final trial or within five months after preliminary or conditional acceptance, should "commence and continue with reasonable diligence" the delivery of the armor, the contractor would have to put it in place; and from this it necessarily follows that if the delivery of the armor, though begun within the time specified, were not continued with reasonable diligence the contractor would not be required to wait for further deliveries, but could deliver the vessel without the balance of the armor (or even without the armor already delivered, if it could not be put on by itself) and should be paid in full whatever was due. Even the reference to five months after a preliminary or conditional acceptance does not mean that the contractor would have to wait for those five months. After such acceptance the vessel could be got ready for a final trip as rapidly as possible, which trip had to take place within the five months, and if the armor was not on hand before the final trip the obligation to put it in place came to an end.

The contract did not, of course, compel the contractor to complete the vessel without the armor, in the event of delay, but it provided that this might be done. If the contractor chose to delay the work on account of the armor, that was its

own affair, and of course it could not fairly claim damages for a delay to which it had voluntarily subjected itself.

This complete provision for the contingency of delay in delivering the armor made it unnecessary to provide for an extension of the time "to enable the claimant to proceed to complete the vessel," as the court below erroneously suggests, because the contractor was clearly entitled "to proceed to complete the vessel" without waiting for the armor. Delay in delivering the armor would *not* "have discharged the claimant from further performance and left it with a right of action for damages on the obligation growing out of the breach," as the court below supposes. The contractor could "continue to perform" without sustaining any damages at all, and while it is true that the contractor had "waived its right to terminate the contract" because of delay in delivering the armor, this was because the contract provided that in that event the vessel should be completed without the armor (or without some portion of the armor), and not because it provided for an extension of time.

This provision for completion of the vessel without the armor protected the contractor's interests much better than the court below supposed they were protected. That the contractor should finish its work and be paid, without incurring any damages, was obviously much fairer than that the contractor should be required to wait indefinitely,

and then sue for damages after the vessel was ultimately completed. Moreover, the provision made it impossible that the Government should, as the court below suggested, "delay the work indefinitely and exonerate itself by the mere granting of additional time in which to enable the contractor to complete its work."

(3) The third reason given by the court below is that the effect of the provision for an extension of time, as relieving the Government from liability for delay, is not expressly stated and can not be inferred. The court says (Rec., 28):

> But this objection [i. e., that the extension of time wiped out all claim for damages on account of delay], the defendants say, should have been considered by the claimant at the time of entering into the contract, and that if not satisfied therewith it could have declined to so contract. This would be true if the contract clearly so recited, or if the language used was susceptible of no other conclusion. We do not think the language used can be construed to exclude claims for damages arising out of such a breach; and if not, then the extension of time would not operate to deprive the claimant of its right to a recovery therefor.
>
> Nor does the doctrine of *expressio unius est exclusio alterius* apply. That doctrine is not of universal application, and is always subject to the intention of the parties, evidenced by the contract.

The court below admits that the provision for an extension of time would have to be understood

as meaning that there should be no liability in damages for the delay "if the language used was susceptible of no other conclusion." It is submitted that that is precisely the case. The language used *is* susceptible of no other conclusion. It must either mean that, or else be wholly superfluous. The provision for an extension of time can not have been intended as a means of relieving the contractor from penalties for delay (as in *Nelson* v. *Pickwick Associated Company*, above cited), for the contract imposed no penalties for the class of delays which would warrant an extension of the time. Neither could this provision have been intended as a means of insuring the completion of the vessel in spite of delays (as the court below suggested), for that matter was fully and explicitly covered by other provisions of the contract. In short, there is nothing else that this provision for an extension of time can mean than just this, that the extension changes the date for the completion of the vessel and wipes out all liability for delays before the date as so changed.

It may indeed be contended that this provision, like all other provisions of the contract, should not be so construed as to work a hardship on the contractor, and that, applying the doctrine of *Lawson* v. *Wallasey Local Board*, above cited, there is an implied contract on the part of the Government that whatever the contract required it to do "should not be *unreasonably* delayed." Even conceding this, however, the fact remains that there

was no unreasonable delay here, the delay being wholly unavoidable as far as the Government was concerned. It was the armor contractors, and not the Government, who actually caused the delay. (Rec., 18.) If the delay in the *Wallasey Board* case had been due to the act of some third party, and not to the board's own neglect, the board could not have been charged with delaying the work unreasonably, and would not have been held liable for such delay.

It is clear, then, that the reasons given by the court below for the existence of this clause for the extension of time fail at every point, the results which the court below supposes were to be attained by the extension being, as a matter of fact, either rendered unnecessary by other provisions of the contract or else attained in a much more satisfactory way.

II.

As to the Second Assignment of Error.

THE FINAL RELEASE OF MAY 18, 1896, RELEASED THE UNITED STATES FROM EVERY KIND OF LIABILITY TO THE CONTRACTOR WHICH COULD ARISE IN CONNECTION WITH THE BUILDING OF THE "INDIANA," INCLUDING LIABILITY (IF ANY SUCH EXISTED) FOR DAMAGES ON ACCOUNT OF DELAY IN FURNISHING THE ARMOR.

The nineteenth clause of the contract contained the following provision:

> When all the conditions, covenants, and provisions of this contract shall have been

> performed and fulfilled by and on the part of the party of the first part, said party of the first part shall be entitled, within ten days after the filing and acceptance of its claim, to receive the said "special reserve," or the surplus, if any, of the said "reserve fund," or so much of either as it may be entitled to, on the execution of a final release to the United States, in such form as shall be approved by the Secretary of the Navy, of all claims of any kind or description, under or by virtue of this contract. (Rec., 15.)

In accordance with this provision the balance of the special reserve, amounting to $41,132.86, was paid the contractor on May 18, 1886, and a release executed containing these words:

> The William Cramp and Sons Ship and Engine Building Company, represented by me, Charles H. Cramp, president of said corporation, does hereby for itself and its successors and assigns, and its legal representatives, remise, release, and forever discharge the United States of and from all and all manner of debts, dues, sum and sums of money, accounts, reckonings, claims, and demands whatsoever, in law or in equity, for or by reason of, or on account of, the construction of said vessel under the contract aforesaid. (Rec., 20.)

If the contract meant, as has been submitted above, that the extension of time should prevent the possibility of there being any claims on account of delay, then of course the meaning of the

provision for a release is immaterial, as far as concerns the present case. This does not mean, however, that the presence of this provision in the contract weakens at all the argument which has just been made above as to the provision for an extension of time. The contingency of other possible claims, besides those due to delay, had to be provided for; and the mere fact that, in providing for a release of such other claims, it was necessary to use language so comprehensive as to include even claims for delay, is no reason for arguing that the provision for extension did not itself affect such claims. It is true that if, as has been shown above, the provision for an extension was intended to preclude claims for delay, it would have been more logical to have specifically excepted such claims from the operation of the release; and yet one can not overlook the fact that it is the general practise in drafting all important written instruments, to multiply provisions, even at the risk of their overlapping, rather than run the chance of leaving anything unprovided for. Redundancy is at least better than a casus omissus.

Even in this view of the case, however, the release may still be regarded as desirable. It was simply a final acknowledgment that the terms of the contract (the time for performance having been extended in accordance with the provisions of the contract itself) had been carried out by the United States. It was a formal confirmation

of all that had been done under the contract, including the extension of time.

If, on the other hand, the provision for an extension of time did not affect claims for delay, then, it is submitted, the provision for a release *must* have been inserted mainly for the very purpose of extinguishing such claims.

The release required by the contract was to cover "all claims of any kind or description under or by virtue of this contract." The actual words of the release are, "all and all manner of debts, dues, sum and sums of money, accounts, reckonings, claims, and demands whatsoever, in law or in equity, for or by reason of, or on account of, the construction of said vessel under the contract aforesaid." The language of the release, though somewhat fuller than that of the contract, must have been intended to cover the precise ground which the contract stated should be covered. There was no authority to require a more complete release, and the words actually used cover the ground at least as completely as do the words of the contract.

The contract being for the construction of the vessel and for no other purpose, it follows that a release of claims on account of such construction must be a release to the United States "of all claims of any kind or description under or by virtue of this contract." Such a release must cover every kind of lawful claim of the contractor, against

the Government, to which anything that was done under the contract gave rise. A claim for damages on account of delay in delivering the armor was certainly a claim "under or by virtue of this contract," because there could have been no such claim had the contract not been made. It was a claim for damages for the failure of the United to do what it had contracted to do, and had the United States not so contracted there could have been no such claim. The claim, moreover, had fully accrued six months before the release was made, for the claim is for damages to November 19, 1895, the date of preliminary acceptance, while the release was made May 18, 1896.

As a matter of fact, claims on account of delay must have been foreseen as more likely to arise than any others. Claims "under or by virtue of this contract" could of course only result from something done or neglected by the Government in the performance of its contract obligation; but while, under the contract, the duties of the Cramp Company were numerous and complex, for it had to build the whole vessel, yet the Government's duties, though important, were very few. It had to pay the installments of the contract price when due, to approve the insurance, to maintain an inspection of the work, if it saw fit to do so, and to determine, by a board of officers, the cost of all changes exceeding five hundred dollars and the damage caused thereby. These were, in their way, comparatively simple matters and not likely

to give rise to claims. As far as concerns the release clause, there could certainly be no claims on account of failure to pay the installments of the contract price, for the release was not to be given until everything due the contractor on the contract was fully paid. There might, conceivably, be claims on account of changes, but it does not appear that there were any changes in the present case, and it is probable that there was from the start very little chance that changes would be made. The approval of the insurance was not likely to give rise to claims, and while, theoretically, some action of the inspectors might do so, the fact that the record discloses no intimation of such a thing is some reason for believing that there was little risk of such claims.

There was, however, one other undertaking of the Government which was really difficult of accomplishment, viz, to deliver, "within the times and in the order required to carry on the work properly," all the armor except that for the protective deck. This armor had all to be obtained from other contractors (Rec., 18), and it is a matter of common knowledge that much of it was of a kind that had never been made before in the United States. As already stated above, the *Indiana* was, in a very real sense, "battle ship *No. 1.*" It is manifest that delay in procuring the armor was the one mischance that was more likely to occur than any other in the carrying out of this contract, and hence that claims on account of such delay were

the one class of claims which the contractor was most likely to have against the Government, and that this fact must have been recognized by the parties when the contract was made. When the Secretary of the Navy required in the contract that a release of all claims should be given before the final payments, he must have had in mind this class of probable claims as the one which, more than any other, made it important that such a release should be required, and the contractor must also have been fully aware of this fact, which was practically self-evident.

The release, being required by the contract itself, was obviously given for a valuable consideration. It was one of the terms of the contract that there should be a release, and the payment of the money which was due under the contract was just as much a consideration for the release as it was for the construction of the vessel itself. The contract can not be cut up into separate parts and one of the claimant's obligations declared to be without consideration, as distinguished from other obligations for which a consideration existed. The consideration must necessarily extend equally to everything which the contractor agreed to do, one of which things was, on receipt of the final payment of all funds reserved, to execute "a final release to the United States in such form as shall be approved by the Secretary of the Navy of all claims of any kind or description under or by virtue of this contract." The release itself shows that $41,132.86

was paid at the time the release was executed, but the consideration was not even limited to this payment. The fact of the payment is merely recited in the release, the consideration for which, as well as for all the other obligations of the claimant, was the total sum paid for the construction of the vessel.

As to the inherent reasonableness of a provision for a release of all claims, including those for damages due to delay, it should not be forgotten that the contract had provided that a failure to deliver the armor at the proper time should not cause any serious delay. The contractor was entitled to complete the vessel without the undelivered armor, and it is manifest that if it had insisted on doing so, no claim on account of the delay could have arisen.

It can not be contended that this release was given under duress, in order to secure a payment of money to which the claimant was lawfully entitled. Under the express terms of the contract the contractor was not entitled to receive the "special reserve, or any part of it," except on "the execution of a final release." The contract may have turned out to be less profitable than the contractor expected, but the time for objecting to its terms was before it was signed. There is no such thing, in the eye of the law, as duress in merely insisting upon the performance of what a man has freely contracted to do.

The court below should therefore have dismissed

the petition on the ground that the claim had been released.

In regard to this release the court below says, however:

> Whatever damages the claimant suffered grew out of the breach by the Government and not by the claimant in its performance and fulfillment of the "conditions, covenants, and provisions" of the contract. The claim, therefore, having arisen out of such breach, was not the subject of release contemplated by the contract, nor was it embraced in the final release. The receipt given by plaintiff did not include the release of claims not considered. * * *
>
> In the present case the claimant was, when it had performed and fulfilled "all the conditions, covenants, and provisions" of the contract, entitled "within ten days after the filing and acceptance of its claim, to receive "final payment, upon the execution of a release to the United States "of all claims of any kind or description under or by virtue of this contract."
>
> As no damages grew out of the performance of the contract by the claimant, no claim was predicated thereon; and as the contract does not provide for the release of claims for damages arising out of a breach by the Government, the signing of the final release does not, for the reasons above stated, conclude the claimant from a recovery, if otherwise entitled. (Rec., 30, 31.)

It is quite true that "whatever damages the claimant suffered grew out of the breach by the Gov-

ernment" and not out of any breach "by the claimant in its performance of the 'conditions, covenants, and provisions' of the contract," and it is equally true that "as no damages grew out of the performance of the contract by the claimant no claim was predicated thereon," but the conclusion drawn from these premises would seem to be a complete *non sequitur*. Damages growing "out of the performance of the contract by the claimant" might properly be the subject of a release given by the Government to the claimant, but the release contemplated by the contract is of precisely the opposite character, viz, a release given *by* the claimant *to* the Government, and the only kind of claim which could be covered by such a release would necessarily be some claim of the claimant against the Government.

The statement that "no claim was predicated" on "the performance of the contract by the claimant" shows that the court below has completely misunderstood the purpose of the release, and this initial misunderstanding seems to have caused the conclusion that "the contract does not provide for the release of claims arising out of a breach by the Government." If this conclusion be true, it can only be because such claims are not "under or by virtue of" the contract.

The view that a claim for damages incurred by a contractor in the performance of a contract, in consequence of a breach of that contract by the other party, is not a claim "of any kind or de-

scription under or by virtue of" the contract, is most extraordinary. Why should it not be a claim "under or by virtue of" the contract, or rather, how can it possibly be anything else? It is a claim under *some* contract, as is admitted by the fact that the suit is brought in the Court of Claims, which has no jurisdiction in tort; and the court below has expressly stated that it grows "out of the breach by the Government . . . of the contract," i. e., the contract for the construction of the *Indiana*. How can such a claim be anything else than a claim "under or by virtue of" that particular contract?

Lastly, the court below says in this connection that "the receipt given by the plaintiff did not include the release of claims not considered," i. e., not submitted to the Secretary of the Navy for consideration before the final payment. The contract says nothing about claims considered or claims not considered, but only that there shall be a release to the United States of "all claims of any kind or description under or by virtue of this contract."

With reference to the latter point, the court below cited its own decision in *Pneumatic Gun Carriage Co.* v. *United States* (36 C. Cls. R., 71). In that case the Secretary of the Navy had expressly excluded claims for damages, due to delays attributable to the Government, from consideration by a board appointed to pass upon certain claims, and had refused to entertain them himself, and it

was therefore held that the release was not "in settlement of the disputed claims between the parties on account of the delay and interruptions." The language of the release in that case was practically the same as in this, but the contract there had been twice modified by supplemental agreements which recognized that the Government had caused the delay, so that the court may there have been justified in holding that the claim for damages due to delay was not covered by the release. This is not specially important, because even if the two cases were precisely alike the case cited as a precedent would be of no greater authority than the decision now under review, so that the only thing to note in this connection is that the decision of the court below is not based on the precedent of any other court. It is, on the other hand, opposed to two authorities, which the court below undertook to distinguish, but which, it is submitted, are really in point.

In *Coulter* v. *Board of Education* (63 N. Y., 365) the contract provided that the final payment should not be made until the contractor had filed a certificate that all claims and demands for extra work, or otherwise under or in connection with the contract, had been presented to the board of education and the amount to be paid therefor agreed upon, and that such last payment was to be in full of every claim or demand whatsoever in the premises, except the amount agreed upon for extra work.

The contractor was put to extra expense by delay caused by some other contractor, but he made no claim on account of such delay until after he had executed the certificate and had received the final payment. The court held that while the terms of the certificate were not of themselves sufficient to constitute a release, yet the contract intended that the final payment should operate as a complete release.

> By this provision the parties evidently contemplated that all claims arising out of or in consequence of the contract should be presented and liquidated before the final payment was made. If the plaintiff had declined to give the certificate he could not have enforced the payment. By giving the certificate he induced the defendant to make the payment, and is, I think, precluded from afterwards setting up other claims. Under the agreement the certificate amounts to a waiver of other demands. The language of the contract is broad and comprehensive—"that such payment is in full of every claim or demand whatever in the premises," whether for extra work or otherwise. It must be borne in mind that this language was used in advance, and we must give it effect according to the intent of the parties; and it seems most rational to suppose that when the certificate was given and the last payment made, together with the amount of other claims which had been liquidated, they designed that the transaction should be

> closed. Parties have a right to make contracts for themselves, and it is the duty of courts to enforce them as made, even though a hardship may be worked. Fraud or mistake may entitle a party to relief, but if neither of these elements exists, the contract must be carried out according to its terms. We think the plaintiffs were required to present this claim and make an effort to have it adjusted according to the contract. Failing in that, they had the option to bring an action or sign the certificate and waive the claim.

The court below undertook to distinguish the *Coulter* case from the present one on the ground that in the former the contractor was required to file a certificate setting forth "all his claims and demands for extra work or otherwise under or in connection with the contract," and that it was his failure to do so which debarred him from thereafter asserting his claim. In the present case, on the other hand, according to the view of the court below, whatever damages the contractor had suffered had grown out of a breach of contract by the Government, and hence the claim was not embraced in the language "all claims of any kind or description under or by virtue of this contract," and consequently was not embraced in the release. As has been already shown above, the present claim must have arisen under some contract, and the contract on which the suit is brought is the only contract under which the claim could have

arisen, so that this attempted distinction between the *Coulter* case and the present one must fail to the ground.

At the trial in the court below there was an attempt to distinguish the *Coulter* case on another ground, which the court below did not think it necessary to discuss, viz, that the Secretary of the Navy had no authority to consider a claim for damages due to a breach of contract, and hence that the present claim could not have been presented to him for settlement. It is true that the doctrine appears to be settled to the effect that an executive officer of the United States has no authority to consider or pay any claim for unliquidated damages for breach of contract; but while the existence of that doctrine might possibly have justified the contractor in refusing to execute the contract or in afterwards requesting a supplemental contract to cover the increased cost of care and preservation or other damages directly due to delay, it should not affect the interpretation of the broad and comprehensive language used in the contract. The important point in this case, as in the *Coulter* case, is that the release required by the terms of the contract was a complete one, admitting of no exceptions or reservations whatever.

If any distinction whatever can be taken between *Coulter* v. *Board of Education* and the present case it must depend upon the terms of the respective contracts in providing for a release. In

the one case the words are "every claim or demand whatsoever in the premises," and in the other case they are "all claims of every kind or description under or by virtue of this contract." It is submitted that the latter phrase is fully as comprehensive as the former, and hence that, as regards the release, no distinction can properly be taken between the two cases.

The bearing of the case of *Phelan* v. *Mayor* (119 N. Y., 86) has been wholly misunderstood by the court below, that portion of the case which is relevant having been overlooked. The suit was to recover a balance alleged to be due upon a contract for regulating the location of a street, but retained by the defendants on account of inspector's fees, and also, *as a second cause of action*, to recover damages sustained by the contractor by reason of the defendants' delay in removing obstructions upon the street, which prevented the prosecution of the work. The court below refers to the first cause of action only, saying "the analogy between that and the present case is hardly perceptible." (Rec., 31.) As a matter of fact there was no analogy whatever, the claim on account of the deduction of the inspector's fees having been specifically excepted from the release which was given, but the court below has totally overlooked the second cause of action, where the analogy is very close.

The report states that upon the completion of the work and the receipt of the final payment the plaintiff executed an instrument by which he released and discharged the city, in the following terms:

> * * * of and from all and all manner of action and actions, cause and causes of action, suits, debts, dues, sums of money, accounts, reckonings, bonds, bills, specialties, covenants, controversies, agreements, promises, variances, trespasses, damages, judgments, extents, executions, claims, and demands whatsoever, in law or in equity, which against them I ever had or now have, or which my heirs, executors, administrators, or assigns hereafter can, shall, or may have, for, upon, or by reason of a certain contract or agreement made [i. e., the contract then in suit] * * * or by reason of any matter, cause, or thing whatever resulting or arising therefrom, * * * except [the claim on account of the inspector's fees].

It was held that this release was a good answer to the second cause of action alleged in the complaint, founded on the delay on the part of the city to remove the obstructions in the street, thereby preventing the plaintiff from proceeding with the performance of the work.

The language of the release in *Phelan* v. *Mayor*

is more verbose than that of the release in the present case, but it is not really any more comprehensive, even understanding the latter release as covering simply the contract requirement of a release "of all claims of any kind or description under or by virtue of this contract." No enumeration of possible claims can go beyond "all claims of any kind or description," and the scope of the words "under or by reason of" is not really increased by adding such words as "by reason of any matter, cause, or thing whatever resulting or arising therefrom."

The court below, through directing its attention to that portion of the opinion in *Phelan* v. *Mayor* which was irrelevant, has undertaken to distinguish that case from the present one; but if it had noticed the portion bearing upon the present issue it would have been compelled to recognize its pertinence.

Changes in the construction of the vessel, and the cost of such changes and the damage caused thereby, are provided for in the second clause of the contract, so that any claim on account of such cost or damage must necessarily be a claim "under or by virtue of" the contract. Similarly, delays are provided for in the third and ninth clauses, and any claim on account of delays for which the Navy Department was responsible (assuming that such a claim was possible after an extension of the time for completion) must also be a claim "under or by virtue of" the contract.

III.

As to the Third Assignment of Error.

THE RETENTION OF THE "INDIANA" AT THE CONTRACTOR'S SHIPYARD, AFTER THE CLOSE OF THE CONTRACT TERM, FOR THE PURPOSE OF HER COMPLETION BY THE CONTRACTOR, DOES NOT AUTHORIZE A CLAIM FOR WHARFAGE.

The cause of action in the present case being the delay in furnishing armor, whereby the completion of the vessel was delayed, it is evident that if any damages be recoverable they must be limited to the amount of the additional expenses incurred by the contractor on account of such delay in completion, and to compensation for any loss or injury which the contractor is proved to have suffered as the direct consequence of such delay. Findings VIII, IX, and XI state certain items of expense incurred by the contractor on account of this vessel, which would not have been incurred but for the delay; but none of the findings show any loss or injury suffered in direct consequence of the delay. Finding X, however, states that the customary rate of wharfage of merchant vessels at the port of Philadelphia at the time the *Indiana* was under construction was one cent per net ton per day, and on the strength of that finding the court has made an allowance of $17,805. Conceding, for the sake of the argument, that the contractor was entitled to damages, it is submitted that such damages should not have included wharfage.

Wharfage is primarily a fee paid for loading goods on a wharf or for shipping them off, but it may also accrue from the use of a wharf as a safe and convenient place at which to moor a vessel, (*The George E. Perry*, 25 Fed. Rep., 780; *The Brooklyn*, 46 id., 132), and it has been briefly defined by this court as "a charge for the use of a wharf." (*Transportation Co.* v. *Parkersburg*, 107 U. S., 691.) This definition was given by way of distinguishing wharfage from tonnage, and for the purpose of such distinction it is undoubtedly correct; but a more complete definition would be "a charge for the use of a wharf by the owner or charterer of a ship or the agents of such owner or charterer." The uses of a wharf which entitle the owner or lessee of the wharf to wharfage may be various, but they are always uses by the shipowner (or charterer) or his agents. In *Ex Parte Easton* (95 U. S., 68) this court said:

> Wharf accommodation is a necessity of navigation, and such accommodations are indispensable for ships and vessels and water craft of every name and description, whether employed in carrying freight or passengers, or engaged in the fisheries. Erections of the kind are constructed to enable ships, vessels, and all sorts of water craft to lie in port in safety and to facilitate their operation in loading and unloading cargo and in receiving and landing passengers.
>
> Piers or wharves are a necessary incident to every well-regulated port, without which

> commerce and navigation would be subjected to great inconvenience and be exposed to vexatious delay and constant peril. * * *
>
> Compensation for wharfage may be claimed upon an express or an implied contract, according to the circumstances. Where a price is agreed upon for the use of the wharf the contract furnishes the measure of compensation, and when the wharf is used without any such agreement the contract is implied, and the proprietor is entitled to recover what is just and reasonable for the use of his property and the benefit conferred. * * *
>
> Repairs to a limited extent are sometimes made at the wharf; but contracts of the kind usually have respect to the voyage, and are made to secure a resting place for the vessel during the time she is being loaded or unloaded. Such contracts, beyond all doubt, are maritime, as they have respect to commerce and navigation, and are for the benefit of the ship or vessel when afloat.

It is manifest that the court was referring to the use of wharves by the owners and charterers of ships, and their agents, and not to use by the owners or lessees of the wharves themselves. The peculiarity of the present case, however, is that the court below has allowed the owners of a wharf to recover wharfage for their own use of their wharf. The *Indiana* did not remain at the Cramp Company's wharf in order to enable the Government to do anything to her, nor was she there for

her own safety; but simply to enable the Cramp Company to complete its work upon the vessel. It was that company, and not the United States, that was making use of the wharf, and it is submitted that there is no authority for allowing wharfage in such a case.

In point of fact, to speak of this item as an allowance for wharfage involves a complete misnomer. It is not wharfage at all, but merely an additional allowance for the use of the Cramp Company's shipyard (which included the wharves), for which the court below has found that "the reasonable value of the use of the claimant's yard, machinery, and tools, and for superintendence in the construction of the vessel, including the general upkeep of the yard, chargeable to the *Indiana* was $3,000 per month" (Rec., 21); but the wharf where the *Indiana* was moored was a part of "the claimant's yard," and this allowance has been made because the *Indiana*, lying at the wharf, was in "the claimant's yard." Hence, it is clear that "the use of the claimant's yard" included the use of the wharf where the *Indiana* lay, and that "the general upkeep of the yard" included the upkeep of that wharf. If a ship were laid up at one of the Cramp Company's wharves for the owner's convenience merely, and not to enable the Cramp Company to do work upon her, there would be no use of the yard except that of the wharf, and the charge would be strictly a charge for wharfage; but in the present case the use of the wharf is

merely a part of that use of the yard for which the court below has made an allowance.

It is apparent that the use of the wharf involved no expense to the Cramp Company beyond that of "general upkeep," for which damages have been allowed, and the findings disclose no indication of any loss or injury suffered by the Cramp Company in consequence of its having had to use one of its wharves for the construction of the *Indiana* for a longer period than it had anticipated. Moreover, even if the findings had shown that the presence of the *Indiana* had occasioned such loss or injury, that could only have been in the "use of the claimant's yard" and the other matters covered by Finding VIII, for which damages have been awarded.

If the *Indiana* had been completed by November 19, 1893, the wharf where she had been lying would then have become available for other uses. The most profitable use to which it could have been put would have been the completion or repair of some other vessel. The record does not show that the Cramp Company was prevented from completing or repairing any other vessel by reason of the *Indiana* occupying a berth at one of its wharves; but assuming, for the sake of the argument, that there was such a vessel, that fact would only prove that, but for the delay here complained of, the items covered by Finding VIII would have been chargeable to such other vessel instead of to the *Indiana*. The court below, having allowed

for "the reasonable value" of the use of the yard, etc., must have intended to cover all the money that the Cramp Company could reasonably have expected to have made from work on some other vessel if the *Indiana* could have been finished and sent off without delay. In other words, the court below has allowed under Finding VIII all that it thought reasonable for the most profitable use of the wharf where the *Indiana* lay.

The court below had some idea that it was falling into error, but did not see the matter clearly. It said, "Regarding the expense for wharfage * * * we are not free from doubt, as the claimant was not a wharfinger, and allowance has been made for the use of the yard." (Rec., 36.) The words, "the expense for wharfage," originated with the court itself, for the claimant had not contended, and could not contend, that it had been put to any expense whatever for wharfage. These words may (and probably do) mean "the charge for wharfage," but if so, the inaccuracy of the language bears testimony to the lack of any clear perception on the part of the court below, as to the true nature of this item of the claim. The statement that "the claimant was not a wharfinger" shows that the court below had a partial idea of the nature of a contract of wharfage, but did not fully understand it. One who is not a wharfinger ordinarily might see fit to act as a wharfinger in some particular instance, i. e., he might contract to give a shipowner the use of a

wharf for his vessel, but in the present case the Cramp Company did what no mere wharfinger could possibly do, viz, completed the construction of a vessel, keeping the vessel at the wharf for the purpose of such construction only. Lastly, the admission of the court below, that "allowance has been made for the use of the yard," recognizes that there is some inconsistency in allowing for that use and also for wharfage; but what the court below failed to perceive is that the allowance under Finding X was not really for wharfage at all, but for "the use of the yard."

If anything more were needed to show the inappropriateness of an allowance for wharfage it would be the excessive rate allowed. Wharfage being primarily, and in the vast majority of instances, allowed for the use of a wharf for unloading and taking in cargo, a matter of a few days only, it is manifest that the Philadelphia rate per day must be intended only for such brief stay at a wharf as would be required for unloading and loading, but $32 a day, or $11,680 a year, would be an enormous rate to pay for the mere right to lay a ship up at a wharf for a long period of time. The court below cites *Ex Parte Easton* (95 U. S., 68–77) as authority for allowing the customary rate in the absence of a contract; but that was a case of regular wharfage, viz, "the use of a wharf by the master or owner of a ship or vessel," and in no way resembled the present case.

IV.

As to the Fourth Assignment of Error.

THE LIABILITY FOR INSURANCE SHOULD NOT EXCEED THE ACTUAL AMOUNT OF THE PREMIUMS PAID DURING THE PERIOD OF DELAY FOR WHICH THE GOVERNMENT IS HELD LIABLE IN DAMAGES, LESS THE AMOUNT OF THE PREMIUMS REFUNDED AT THE CLOSE OF THAT PERIOD, AND ALSO LESS THE AMOUNT SAVED BY THE CONTRACTOR ON ACCOUNT OF HAVING TO MAINTAIN LESS INSURANCE DURING THE ORIGINAL CONTRACT TERM THAN IF THE VESSEL HAD BEEN COMPLETED WITHIN THAT TERM.

The court below finds that the reasonable cost of the insurance of the vessel during the two years' delay was $34,463.55 (Rec., 21–22), and has allowed a part of this, proportioned to the length of time from May 10, 1894. The opinion (Rec., 36) states that the amount allowed is "the reasonable amount paid out by the claimant during that period." In basing the allowance on the amount actually paid out by the claimant during the period of delay the court below has plainly failed to consider that the delay necessarily saved the claimant some expense for insurance during the contract term, which saving should have been deducted. The contract provided "for due insurance of the vessel by the contractor, for the benefit of the Government, which insurance shall be renewed and increased from time to time by and at the expense of the [contractor]

* * * in such companies as shall be approved by the Secretary of the Navy, and in an amount to be fixed, from time to time by him, not exceeding the amount of the advance payments made under this contract." (Rec., 9.) This meant that the amount of insurance was always to be proportionate to the amount of the advance payments, a very necessary arrangement, because each advance payment marked an increase in the Government's possible loss in case of any injury to the vessel while in the contractor's hands. The cost of the insurance was therefore constantly increasing, and reached its maximum just before the vessel was accepted by the Government.

While the findings do not show when the various advance payments were made, they incidentally state that the first twenty-seven were earned by June 20, 1894 (Rec., 19), leaving three to be earned before final delivery; but if there had been no delay, all thirty installments would have been earned and paid by November 19, 1893. Prior to that date, therefore, the insurable value of the vessel was less than it would have been had there been no delay, and the cost of insurance was proportionately less than it would have been. In other words, the delay enabled the contractor to save money on insurance during the contract period, and if insurance after that time be an item of damage the amount so saved should be deducted from the amount allowed for such later insurance,

in order to reach the net amount of extra cost actually incurred by the contractor on this item.

The court below has failed to make this very necessary deduction, and consequently the judgment covers a larger sum for insurance than the contractor actually spent, on account of the delay for which the Government is held liable in damages. The net amount actually so spent should moreover be determined with reference to actual payments made during the period to which the Government's liability extends, while the court below has taken merely a proportion of the amount paid during a longer period, which proportion may be more or less than the actual payments during the shorter period but can hardly be the same.

For these reasons, therefore, the judgment of the court below should be reversed as far as concerns the allowance of any damages on account of wharfage, and also as to the computation of the cost of insurance; but as regards the whole case it is submitted that the judgment should be reversed altogether.

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